

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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UNITED STATES OF AMERICA

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION
DISTRICT, a corporation, et al.,

Defendants.

IN EQUITY NO. C-125-ECR
SUBFILE C-125-B

**REPLY MEMORANDUM IN SUPPORT OF
THE MOTION OF THE UNITED STATES
AND WALKER RIVER PAIUTE TRIBE
TO ADOPT CASE MANAGEMENT
ORDER**

Alice E. Walker
Scott B. McElroy
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
303/442-2021

Kel y R. Chase
P.O. Box 2800
Minden, NV 89423
702/782-5110

*Attorneys for the WALKER RIVER PAIUTE
TRIBE*

Kathryn E. Landreth, United States Attorney
100 West Liberty St., Suite 600
Reno, NV 89509
702/784-5439

Susan Schneider
United States Department of Justice
Environment & Natural Resources Division
999 18th St., Suite 945
Denver, CO 80202
303/312-7308

Hank Meshorer, Special Litigation Counsel
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397
202/616-9643

Attorneys for the UNITED STATES OF AMERICA

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I. INTRODUCTION

The United States and the Walker River Paiute Tribe ("Tribe") respectfully request the Court adopt the attached Case Management Order, which has been revised to reflect certain of the positions of the parties as stated in the recent round of briefing. A copy of the revised order is attached as Exhibit A with the revisions emphasized.

The Walker River Irrigation District ("District"), the State of Nevada ("Nevada") and the State of California ("California") (referred to collectively as "state parties") previously requested the adoption of the *[Proposed] Order Concerning Case Management* ("state parties' proposed order") submitted by Nevada and the District. *Joint Motion Concerning Case Management* (Jan. 21, 2000), Exhibit. A. In advocating for the adoption of the state parties' proposed order, the state parties oppose the approach of the United States and the Tribe as reflected in the proposed *Case Management Order* previously submitted on January 21, 2000 ("U.S. and Tribe's proposed order"). The state parties take the position that nothing can or should be done to advance any aspect of this litigation until all of the necessary parties are identified, named and joined by the United States and the Tribe. *See Walker River Irrigation District's Points and Authorities in Opposition to Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order* at 1 (Feb. 22, 2000) ("District Opp."). In contrast, the United States and the Tribe believe that the existing parties to the case must start immediately to develop the procedures for the efficient and fair adjudication of the Tribal and Federal Claims. Such a method should begin now rather than later to establish the procedures for resolving the multitude of currently identifiable issues related to the Tribal Claims.

All of the arguments among the parties over the proposed case management orders stem from this underlying disagreement which permeates the specific issues of bifurcation, threshold

1 questions, discovery and the joinder of the appropriate parties. We cannot overemphasize the
 2 significance of this dispute. The state parties fail to offer any suggestions for fostering the
 3 efficient adjudication of the pending claims but, instead, argue only that the proposals advanced
 4 by the United States and the Tribe are inadequate. The result of the state parties' approach
 5 would be to litigate this case in the most tedious and time-consuming manner imaginable,
 6 potentially denying to the United States and the Tribe the ability to have their claims heard at all.

8 **II. ARGUMENT**

9 **A. BIFURCATION OF THE TRIBAL CLAIMS WILL CONTRIBUTE TO THE** 10 **EFFICIENT ADJUDICATION OF THE TRIBAL AND FEDERAL CLAIMS.**

11 In arguing against bifurcation, the District and Nevada confuse the distinct issues of
 12 joinder of parties and determination of threshold issues with the more basic question of
 13 bifurcation of the Tribal and Federal Claims. *See* District Opp. at 3-6; *State of Nevada's*
 14 *Response to the Motion of the United States and Walker River Paiute Tribe to Adopt Case*
 15 *Management Order* at 3 (Feb. 18, 2000) ("Nevada Response"). Parts B and C below address the
 16 questions related to the determination of the threshold issues and joinder. The question related
 17 to bifurcation, however, is considerably different, requiring the parties and the Court to consider
 18 whether it would be more efficient to address the Tribal Claims apart from the other Federal
 19 Claims or if, as the state parties contend, addressing all of the claims together would be more
 20 productive. *See* Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1, 5 (D. Puerto Rico
 21 1997) ("The Court's decision hinges on one deceptively simple equation: Is the potential benefit
 22 of bifurcation greater or less than the potential detriment of bifurcation?"); *see generally*
 23 *MANUAL FOR COMPLEX LITIGATION*, THIRD § 21.632 (1995).

24 As even the District concedes, the various claims must be addressed in some order.
 25 District Opp. at 5 n.2. Despite that concession, the District appears to contend that before the
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1 Court can address any substantive aspect of the Tribal Claims, the parties must complete pretrial
2 proceedings on the full scope of the Federal Claims. Id. at 4-5. To state the obvious, that course
3 of action would delay the resolution of the Tribal Claims for decades and would effectively
4 prevent the Court from addressing any concrete issue for many, many years. See Industrias
5 Metalicas Marva, Inc., 172 F.R.D. at 4 (“As an initial matter, we reject out of hand Marva’s
6 contention that this issue is premature. The Court believes that simplifying discovery would be
7 the major benefit of bifurcation in this case.”).

9 The United States and the Tribe assert that the logical order for the case is to begin with
10 the Tribal Claims and to limit the initial phase of the case to those claims. Discovery, the
11 preparation of expert reports, the resolution of threshold issues and the other pretrial
12 requirements related to the Tribal Claims will be a monumental task which will keep the parties
13 fully engaged. It makes no sense to require that while working on the pretrial aspects of the
14 Tribal Claims, the parties simultaneously engage in the daunting task of preparing the Federal
15 Claims for trial. In sum, the parties will be hard-pressed to deal with the pretrial proceedings for
16 the Tribal Claims in a timely fashion; the job of addressing all the Federal Claims concurrently
17 would be virtually impossible.

19 To be sure, there may be an overlap between some of the disputed legal issues raised by
20 the Tribal Claims and those presented by the Federal Claims. Those issues, however, do not
21 arise in a vacuum but are tightly intertwined with factual matters unique to the particular claim.
22 Among other things, the history of each federal establishment is different, as are the water needs
23 that are the subject of the Federal Claims. Ultimately, as the District notes, the different claims
24 will have to be “tried” not argued. District Opp. at 4-5. See United States v. 1,071.08 Acres of
25 Land, 564 F.2d 1350, 1352-53 (9th Cir. 1977) (holding that in a condemnation action, district
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1 court did not abuse its discretion in ordering separate trials because, among other things, the
2 “property interests” of one owner were “a separate claim” from that of the other). Here, instead
3 of addressing all of the claims at each stage of the case before advancing to the next stage, it
4 would be far more efficient and practical to proceed claim by claim, progressing from discovery
5 through trial on the Tribal Claims prior to addressing any aspect of the other claims. See Cook
6 v. United Service Auto. Ass’n, 169 F.R.D. 359, 362 (D.Nev. 1996) (noting that in that case
7 “[b]ifurcation will also simplify the issues for trial.” (citation omitted)). Following a different
8 course of action threatens to bury the parties and the Court in massive and complex pretrial
9 proceedings that encompass every aspect of water use in the Walker River basin and render it
10 infeasible for the Court to address any issue in a meaningful fashion. See *Minutes of the Court at*
11 *3* (May 11, 1999) (expressing concern that in the absence of the appropriate procedural
12 foundation, such as the case management order proposed by the United States and the Tribe, “the
13 introduction of groundwater claims may be necessary to the counterclaims, but such will greatly
14 increase the complexity of the litigation and could possibly make it simply impractical to
15 proceed.”). Moreover, the decision to bifurcate should be made now so that the remainder of the
16 case, including the other issues before the Court related to case management, can be resolved
17 appropriately. *C.f.*, Cook v. United Service Auto. Ass’n, 169 F.R.D. 361-62. (“Under these
18 circumstances, bifurcation furthers the interest in the expedient resolution of litigation.”).

22 **B. THE CURRENT PARTIES SHOULD BEGIN WORK ON THE THRESHOLD**
23 **ISSUES WHICH THEY CAN IDENTIFY NOW.**

24 The dispute over the threshold issues involves a disagreement over timing as well as a
25 dispute over the scope of the threshold questions to be addressed. The state parties appear to
26 contend that nothing should be done with regard to identifying threshold issues or working
27 towards the resolution of those issues until “after all parties have been identified, named and
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26 contend that nothing should be done with regard to identifying threshold issues or working
27 towards the resolution of those issues until “after all parties have been identified, named and
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1 served . . . ,” at which time a conference would be held to begin to address the procedures for
2 identifying and resolving such issues. District Opp. at 6. That approach is remarkably
3 shortsighted. “The *sine qua non* of management of complex litigation rests on the definition of
4 the issues in the litigation.” MANUAL FOR COMPLEX LITIGATION, THIRD § 21.31 (1995) (citation
5 omitted). That task should be initiated promptly among the existing parties.
6

7 The United States and the Tribe agree that the threshold issues cannot finally be resolved
8 until all appropriate parties are joined, but assert that the current parties should begin to identify
9 threshold issues related to the Tribal Claims and to initiate discovery in connection with those
10 issues. That would not foreclose subsequently named parties from identifying additional issues
11 or presenting supplemental information relative to the already identified issues. But the
12 practical reality remains that the state parties are likely to carry the laboring oar in this litigation.
13 Indeed, the District appears to have given the matter considerable thought already, asserting, for
14 example, that claim preclusion “may apply to some or all of the Tribal Claims” District
15 Opp. at 5. In short, there is no reason to delay grappling with the question of the appropriate
16 threshold issues, recognizing that until all parties are joined, no final designation of issues can be
17 achieved nor can those issues be resolved.
18

19 The alternative is not attractive. Under the state parties’ approach, nothing will be done
20 with regard to the Tribal Claims until service is complete. At that time, discovery would
21 presumably commence with disclosures by the United States and the Tribe with the state parties
22 thereafter requesting a substantial period of time to prepare their own expert reports. after which
23 depositions and other discovery would be scheduled and completed. Under the state parties’
24 proposal, only then would the parties be obligated to identify the appropriate threshold questions.
25 We do not mean to suggest that the United States and the Tribe are ready to make full disclosure
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1 relative to the Tribal Claims in the immediate future, only that there is no need to await
 2 completion of service to begin to identify the issues and to establish an appropriate approach to
 3 discovery, so that those issues may be addressed by the Court, within a reasonable time after
 4 service is complete, and the newly joined parties have had the opportunity to participate in the
 5 final framing of the issues and the production of the material necessary to address those issues.

7 **C. JOINDER OF PARTIES.**

8 The question of who should be joined in this case at what time is a difficult issue. It is
 9 complicated by the fact that the United States Board of Water Commissioners apparently cannot
 10 identify the parties entitled to use water under the Decree in this case, just as Nevada and
 11 California cannot specify who is entitled to use water from the Walker River or the associated
 12 aquifers under state law.¹ Only slightly less surprising is the fact that the District claims that it
 13 cannot name its members who use water under the terms of the Decree or pursuant to state law.
 14 District Opp. at 9-10. While the state parties adamantly assert that the identification of those
 15 entitled to use water under the Decree or state law is not necessary for the proper implementation
 16 of their legal duties, they are equally resolute that all such parties must be named, served and
 17 joined by the United States and the Tribe with no more than minimal assistance from the state
 18 parties and the Board of Water Commissioners. That position does not withstand scrutiny.

21 **1. The Determination of the Appropriate Parties to be Joined.**

22 The difficult question related to joinder is determining who should be named as a
 23 party in this case. The problem arises from the fact that there is no readily identifiable list of
 24 people who are legally entitled to use water under the Decree or pursuant to state law. Thus, to
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 27 ¹California has provided helpful guidance as to the general scope of the information
 28 which it does have in its files. California Response at 2-3.

1 carry out the Court's directive of naming all water users, the United States and the Tribe must
2 find a way to identify such individuals from a variety of sources including the District's
3 assessment roles, Nevada's and California's water rights files, and information held by the Board
4 of Water Commissioners. Even in the best of circumstances, that information may not identify
5 all users in the basin, nor will it tell who actually holds the legal right to use such water. Thus,
6 some other process must be developed to name all parties with an interest in the use of water in
7 the basin, particularly if California groundwater users are to be subject to the adjudication.
8 Under such a process, it will be extremely difficult to determine the extent to which certain
9 parties are truly affected by the adjudication. Undoubtedly, some parties will be named who will
10 have little or no interest in the case.
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13 The burden on parties who are named but who have little or no interest in the
14 litigation may be substantial. The state parties advocate the filing of lis pendens on property that
15 is the subject of the litigation. Extracting oneself from the litigation and the adverse
16 consequences of a lis pendens may require retaining a lawyer and the expenditure of
17 considerable funds. In addition to those with no interest who will be burdened by being named
18 as a party, entities with minimal or distant interests may also have significant costs associated
19 with their participation in the litigation, yet have relatively little risk. If such parties were not
20 joined, they would not be bound by the litigation, just as the United States and the Tribe are not
21 bound by the actions of the Nevada State Engineer in granting permits and certificates for the
22 use of groundwater. In other words, balanced against the concern that every affected water user
23 should have the right to participate in the litigation is the burden that will be placed on those who
24 are named but have little or no real interest in the outcome.
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1 The United States and the Tribe proposed to resolve this dilemma by bifurcating
2 the Tribal Claims and then seeking, in the first phase of the proceedings, to limit the water users
3 to be joined to the geographic areas closer to the Reservation. Needless to say, those geographic
4 areas could be expanded if the state parties assert that the hydrological relationship between the
5 use of groundwater in such areas to the use of water on the Walker River Indian Reservation
6 justifies the inclusion of additional areas in the adjudication. In addition, the United States and
7 the Tribe suggested that there was no need to name domestic groundwater users at this time.
8 Such an approach, in our view, includes those most affected by the immediate issues before the
9 Court and would avoid unnecessary expense and burden to those with no practical interest in the
10 outcome of the presently proposed first phase of the proceeding. We continue to believe that
11 such an approach is a practical solution to a serious problem.
12

13 The state parties object to the United States' and the Tribe's position that the
14 bifurcation of the Tribal Claims permits the joinder of a geographically limited number of water
15 users. *See* District Opp. at 6-8. The notion that every groundwater user in the basin must be
16 joined in order to adjudicate the Tribal Claims is not consistent with the prior position of the
17 District. The District previously argued that "consideration should be given to separating [the
18 Tribal and Federal Claims for groundwater] from the surface water claims and separating such
19 claims by hydrographic basin." *Walker River Irrigation District's Points and Authorities in*
20 *Support of Motion for Scheduling and Planning Conference and in Response to United States'*
21 *and Walker River Paiute Tribe's Joint Motion for Leave to Serve First Amended Counterclaims,*
22 *to Join Groundwater Users, to Approve Forms for Notice and Waiver and to Approve Procedure*
23 *for Service for Pleadings Once Parties Are Joined* at 14 (Nov. 9, 1998) ("1998 District
24 Response"). The District also asserted that "recognition should be given to the fact that, at least
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1 with respect to groundwater, there are several separate and distinct groundwater basins
 2 involved.” Id. at 15. According to the District, “[in] Nevada, the Nevada State Engineer
 3 recognizes and separately regulates the Antelope Valley hydrographic basin, the Smith Valley
 4 hydrographic basin, the East Walker hydrographic basin, the Mason Valley hydrographic basin
 5 and the Walker Lake hydrographic basin.” Id.² Now that the United States and the Tribe have
 6 acceded to the concept previously espoused by the District, it changes course. But there is no
 7 reason to believe that the State Engineer’s approach of separating the Walker River basin into
 8 separate hydrographic basins for groundwater regulatory purposes could not be similarly applied
 9 to this adjudication, to keep the determination of the Tribal Claims within manageable limits and
 10 to avoid the joinder of parties with no real interest in the outcome.
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13 Although a decision needs to be made so that the difficult process of identifying
 14 the water users within each category can begin, the issue of who is joined is less significant than
 15 the other issues related to case management that are before the Court. The more troubling
 16 question with regard to joinder is determining the appropriate procedure for developing the list
 17 of entities to be served, whether that list includes some or all of the water users in the basin.
 18 Subpart 2 addresses that question.
 19

20 **2. The State Parties must Cooperate in the Identification of the Parties to Be**
 21 **Joined.**

22 The most disconcerting aspect of the state parties’ response to the U.S. and
 23 Tribe’s proposed order is their apparent resistance to cooperating in the development of the list
 24 of entities to be joined in the case. *See State of California’s Response to Motion of the United*
 25 *States and Walker River Paiute Tribe to Adopt Case Management Order* at 2-4 (Feb. 18, 2000)
 26

27 ²A map showing the different hydrographic basins was attached as Exhibit A to the 1998
 28 District Response. That map is reproduced as Exhibit B to this memorandum.

1 (“California Response”); District Opp. at 8-9 (among other things, the District complains that the
 2 proposed order would direct them to “advise their members and constituents of the need to
 3 cooperate fully with [the United States’] efforts” to complete service.);³ Nevada Response at 1
 4 (adopting the District’s arguments). Our desire is to avoid the controversy that has plagued
 5 Mineral County’s efforts to accomplish service. To attain that objective, four things are needed:
 6 (1) resolution of the categories of users to be joined; (2) the cooperation of the state parties and
 7 the Board of Water Commissioners in providing all relevant information in their files to the
 8 United States and the Tribe; (3) an interim process to ascertain whether the list developed by the
 9 United States and the Tribe is adequate; and (4) the supervision of the Magistrate Judge to
 10 ensure cooperation and that problems are identified and resolved expeditiously. The state parties
 11 offer little of substance in response.
 12

13
 14 First, rather than agree to cooperate, the District and Nevada complain that
 15 providing information which they possess to the United States and the Tribe related to the
 16 identification of parties “with claims to surface water and/or groundwater” somehow means that
 17 they, not the United States and the Tribe, would be required to identify the potential defendants
 18 in the case. District Opp. at 9. The state parties plainly have a substantial amount of information
 19 that is relevant to the identification of potential water rights claimants. Under the U.S. and
 20 Tribe’s proposed order, they would be required to provide that information to the United States
 21 and the Tribe. Although not spelled out, presumably that process would work much the same as
 22 discovery with the producing party having a variety of options to make the relevant information
 23
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25
 26 ³The proposed Case Management Order would require the District to advise its members
 27 of the Court’s directive that they cooperate in the service effort. That does not create an attorney
 28 client relationship between the District and its members. Dist. Opp. at 10. Instead, it simply
 attempts to facilitate procedural cooperation among the parties.

1 available to the requesting party. The only burden on the producing party is to specify the
2 relevant information in their files and make it available in some fashion. Likewise, we fail to see
3 the problem with requiring the state parties to provide modified or changed information within a
4 reasonable time frame.
5

6 Certainly, the District's reliance on Oppenheimer Fund, Inc. v. Sanders, 437 U.S.
7 340 (1978), is misguided. See District Opp. at 9. As the District notes, that case involved the
8 assignment of costs relative to the development of information for the identification of members
9 of a plaintiff class. While the Court found that the plaintiff may be required in such situations to
10 bear the cost associated with completing an investigation as to the names and addresses of the
11 members of the class, that rule applies only to tasks which remain to be performed, not
12 information already available in the files. Oppenheimer, 437 U.S. at 356. The Court explicitly
13 noted that the rule did not apply when "the task ordered is one that the defendant must perform
14 in any event in the ordinary course of its business." Id. at 359. Here, we ask only for existing
15 information related to the identification of parties who use water under the Decree or pursuant to
16 state law. We have not asked the state parties to determine who the parties are to be named -- a
17 task that might well fit within the Oppenheimer rule requiring the producing party to conduct
18 tasks for which it is responsible. Perhaps the District has no obligation to ensure that its
19 assessment role reflects the proper ownership of the lands within the District to which water is
20 applied. But certainly the Board of Water Commissioners has an obligation to ascertain who is
21 entitled to use water under the Decree. Likewise, California and Nevada have some obligation
22 to determine who uses water under state law. In any event, if they had accomplished those tasks,
23 this aspect of this dispute would not be before the Court.
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1 Dated: Mar. 6, 2000

Respectfully submitted,

2 Kathryn E. Landreth
3 UNITED STATES ATTORNEY
4 100 West Liberty St., Ste. 600
5 Reno, Nevada 89509
6 702/784-5439

7 Susan Schneider
8 UNITED STATES DEPARTMENT OF JUSTICE
9 Environment & Natural Resources Division
10 999 18th Street, Suite 945
11 Denver, Colorado 80202
12 303/312-7308

13 *Attorneys for the United States of America*

14 Scott B. McElroy
15 Alice E. Walker
16 GREENE, MEYER & McELROY, P.C.
17 1007 Pearl Street, Suite 220
18 Boulder, Colorado 80302
19 303/442-2021

20 Kelly R. Chase
21 P.O. Box 2800
22 Minden, Nevada 89423
23 702/782-5110

24 By: 
25 Scott B. McElroy

26 *Attorneys for the Walker River Paiute Tribe*

CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Reply Memorandum in Support of the Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order in the U.S. Mail, first-class postage prepaid thereon, on this 6th day of March, 2000, addressed to the following:

Marta Adams
Deputy Attorney General
Capitol Complex
100 N. Carson St..
Carson City, NV 89701

Ross E. deLipkau
Marshall, Hill, Cassas & deLipkau
P.O. Box 2790
Reno, NV 89505

Robert C. Anderson
Timothy Lukas
Alex J. Flangas
Hale, Lane, Peek, Dennison, Howard
100 W. Liberty, 10th Floor
P.O. Box 3237
Reno, NV 89505

Gordon H. DePaoli
Dale E. Ferguson
Woodburn and Wedge
6100 Neil Rd., Ste. 500
Reno, NV 89511

George Benesch
1025 Ridgeview Dr., Suite 400
P.O. Box 3498
Reno, NV 89505

Daniel N. Frink
Water Resources Control Board
State of California
P.O. Box 100
Sacramento, CA 94814

Roger Bezayiff
Chief Deputy Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Richard R. Greenfield
Field Solicitor's Office
Department of the Interior
2 North Central Avenue, Suite 500
Phoenix, AZ 85004

Linda A. Bowman
Bowman & Robinson
540 Hammill Lane
Reno, NV 89511

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay St., 20th Floor
Oakland, CA 94612-1314

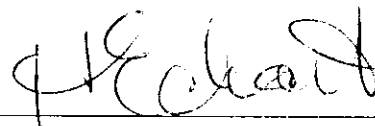
Kelly R. Chase
P.O. Box 2800
Minden, NV 89423

Treva J. Hearne
James S. Spoo
Zeh, Polaha, Spoo & Hearne
575 Forest Street
Reno, NV 89509

John Davis
P.O. Box 1646
Tonopah, NV 89049

Robert L. Hunter, Superintendent
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

1	John Kramer	Susan Schneider
2	Department of Water Resources	U.S. Department of Justice
3	1416 - 9th Street	Environment and Natural Resources Div.
4	Sacramento, CA 95814	Indian Resources Section
5	Kathryn Landreth, U.S. Attorney	999-18th Street, Suite 945
6	Shirley A. Smith, Asst. U.S. Attorney	Denver, CO 80202
7	100 W. Liberty, #600	
8	Reno, NV 89501	Stuart Somach
9	Hank Meshorer, Special Litigation Counsel	William Hvidsten
10	United States Department of Justice	John A. Mendez
11	Environment & Natural Resources Division	DeCUIR & SOMACH, P.C.
12	Ben Franklin Station	400 Capitol Mall, Suite 1900
13	P.O. Box 7397	Sacramento, California 95814-4407
14	Washington, D.C. 20044-7397	
15	David E. Moser	Kenneth Spooner, General Manager
16	Matthew R. Campbell	Walker River Irrigation District
17	McCutchen, Doyle, Brown & Enerson	P.O. Box 820
18	Three Embarcadero Center, Suite 1800	Yerrington, NV 89447
19	San Francisco, CA 94111	
20	Michael W. Neville	Garry Stone
21	Deputy Attorney General	290 South Arlington Ave.
22	California Attorney General's Office	Reno, NV 89501
23	455 Golden Gate Ave., Suite 11000	
24	San Francisco, CA 94102-3664	R. Michael Turnipseed, P.E.
25		Division of Water Resources
26		State of Nevada
27		123 West Nye Lane
28		Carson City, NV 89710



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	IN EQUITY NO. C-125-ECR
WALKER RIVER PAIUTE TRIBE,)	SUBFILE NO. C-125-B
)	
Plaintiff-Intervenor,)	
)	
vs.)	CASE MANAGEMENT ORDER
)	
WALKER RIVER IRRIGATION)	
DISTRICT, a corporation, et al.,)	
)	
Defendants.)	
)	
)	

RECITALS

This Case Management Order establishes the procedures for the Court to begin consideration of the water rights claims of the Walker River Paiute Tribe ("Tribe") and the United States on behalf of the Tribe, contained in the *First Amended Counterclaim of the United States of America* (July 31, 1997), and the *First Amended Counterclaim of the Walker River Paiute Tribe* (July 31, 1997), and the defenses that may be raised to those claims. In addition to the claims it has asserted on behalf of the Tribe, the United States also has made surface water and groundwater claims for additional federal and tribal uses in the Walker River Basin. See *United States' and Walker River Paiute Tribe's Joint Motion for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and Waiver, and to Approve Procedure for Service of Pleadings Once Parties Are Joined* (Aug. 19, 1998).

On May 11, 1999, this Court entered a Minute Order which provided for a scheduling conference to establish procedures for the management of this matter and identified certain issues of concern. *Minutes of the Court* (May 11, 1999). At a telephonic hearing with the Court

1 on May 21, 1999, the parties agreed to attempt to stipulate to a case management order that
 2 would address these issues. *Minutes of the Court* (May 21, 1999). After that effort failed, the
 3 parties presented their respective positions to the Court. This Case Management Order followed.
 4

5 This Case Management Order bifurcates the claims asserted by the Tribe and the United
 6 States on the Tribe's behalf from those claims which the United States makes on its own behalf
 7 or on behalf of other tribal entities. The Order next defines certain threshold issues which must
 8 be addressed. The Order then establishes an initial approach to service that is intended to
 9 encompass those parties who should participate in the determination of the threshold issues
 10 raised by the tribal claims. Finally, the Order establishes a procedure for addressing discovery in
 11 connection with the threshold issues.
 12

13 CASE MANAGEMENT ORDER

14 The Court hereby ORDERS as follows:

15 A. BIFURCATION

16 1. The claims of the Tribe contained in the *First Amended Counterclaim of the*
 17 *Walker River Paiute Tribe* (July 31, 1997) and those claims by the United States on behalf of the
 18 Tribe (First, Second and Third Claims for Relief) set forth in the *First Amended Counterclaim of*
 19 *the United States of America* (July 31, 1997) (collectively "Tribal Claims") are hereby bifurcated
 20 from all other claims (Fourth through the Eleventh Claims for Relief in the *First Amended*
 21 *Counterclaim of the United States of America* (July 31, 1997) ("Federal Claims") raised by the
 22 United States in its pleading.
 23

24 2. The Tribal Claims shall proceed as described in this Case Management Order.
 25 All discovery and all other proceedings in this action related to the Federal Claims are stayed
 26 until further order of the Court.
 27
 28

B. THRESHOLD ISSUES RELATIVE TO THE TRIBAL CLAIMS

The following issues are threshold issues to the resolution of the Tribal Claims that should be addressed at the outset of the litigation.

3. Whether the Court has jurisdiction to adjudicate the Tribal Claims. If so, to what extent should the Court exercise its jurisdiction in these matters?

4. Does federal law govern the pumping of groundwater on the Walker River Indian Reservation by the Tribe or the United States on its behalf?

5. If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by state law?

6. Whether the Court has jurisdiction over groundwater used pursuant to state law outside the exterior boundaries of the Reservation if such uses interfere with the Tribe's rights under federal law to use water from the Walker River system. If so, should the Court exercise that jurisdiction?

7. Whether equitable defenses bar all or some of the Tribal Claims. Within 60 days of the adoption of this Case Management Order, the present parties shall advise the Court and the other parties of any such defenses or issues they intend to assert.

The above list of threshold issues regarding the Tribal Claims will not be finally resolved until all appropriate parties are joined. Nevertheless, the parties are directed to identify all potential threshold issues promptly and to work together and with the Court to resolve these issues so that this matter may proceed as promptly as possible upon the conclusion of service. In general, the Court will consider for inclusion as threshold issues, issues that address the following matters: jurisdiction, claim preclusion, applicable law, equitable and other defenses raised by any party.

C. JOINDER OF PARTIES

6. Within 30 days of the adoption of this Case Management Order or as otherwise ordered by the Magistrate Judge, the parties shall meet with the Magistrate Judge to determine the appropriate procedures for the exchange of information pursuant to ¶ 5 below and for such other purposes as the Magistrate Judge deems appropriate. The United States and Tribe shall report to the Magistrate Judge concerning the status of service at 120-day intervals following the entry of this Case Management Order. The parties shall meet periodically with the Magistrate Judge at his discretion to ensure that matters related to service are proceeding appropriately and that the parties are cooperating in accomplishing that task.

7. Prior to the resolution of the threshold issues identified in Section B of this Case Management Order, the United States and the Tribe shall effect service of their first amended counterclaims, notices in lieu of summons, requests for waiver of service, and this Case Management Order on all of the members of the categories of water right holders described below:

a. All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basin who are not presently parties to this adjudication.

b. All successors in interest to the water right holders under the *Decree* (Apr. 14, 1936), modified, *Order for Entry of Amended Final Decree to Conform to Writ of Mandate. Etc.* (Apr. 24, 1940) ("1936 Decree").

c. All holders of permits to pump groundwater issued by the State of Nevada within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Shurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

d. All holders of "vested rights" to the use of groundwater under the law of the State of Nevada within the Walker River Basin.

1 e. All municipal providers in Nevada **within the Walker River Basin** who
2 currently use groundwater.

3 f. All municipal providers in California **within the Walker River Basin**
4 who currently use groundwater.

5 g. All industrial users in Nevada **within the Walker River Basin** who
6 currently use groundwater .

7 h. All industrial users in California **within the Walker River Basin** who
8 currently use groundwater.

9
10 8. Within **60** days of the entry of this Case Management Order by the Court, the
11 parties shall submit an agreed-upon Notice in Lieu of Summons for the Tribal Claims and
12 **agreed-upon procedures related to the recording of these Notices** to the Court for its
13 approval. **To the extent that the parties cannot agree upon these issues, they shall submit**
14 **their own proposals regarding these issues. Procedures for the recording of Notices of Lis**
15 **Pendens with the appropriate recorder of property will be finalized with the Magistrate**
16 **Judge in conjunction with approval of the above Notice.**

17
18 9. To the extent that the United States and the Tribe cannot effect service upon or
19 obtain a waiver of service from all of the individual members of the categories defined in ¶ 2 of
20 this section, and after demonstration to the Magistrate Judge of reasonable efforts in attempting
21 such service, the Court, upon motion of the United States and/or the Tribe shall allow
22 completion of service as to such individuals and entities, and as to all other surface water and
23 groundwater rights claimants not identified, by publication consistent with FED. R. CIV. P. 4.
24 The parties have agreed that the notice requirements would be satisfied by publication at least
25 once a week for four weeks of the Notice in Lieu of Summons, or any other document to which
26 the parties agree, the Tribe's and the United States' first amended counterclaims, and this Case
27
28

1 Management Order in the MINERAL COUNTY INDEPENDENT NEWS, in Hawthorne, Nevada, the
 2 RECORD COURIER in Gardnerville, Nevada, the MASON VALLEY NEWS in Yerington, Nevada,
 3 and the REVIEW-HERALD in Mammoth Lakes, California. **Before any such publication occurs,**
 4 **the parties and the Court will confirm that these newspapers remain the appropriate**
 5 **periodicals for publication, and, if appropriate, will designate any substitute periodicals.**

7 10. The Walker River Irrigation District ("District"), the State of Nevada, the State of
 8 California, the United States Board of Water Commissioners and Mineral County shall identify
 9 and provide (in electronic format to the extent available) to the United States and the Tribe all
 10 information in their possession, custody or control identifying all individuals and entities with
 11 any claims to surface water and/or groundwater in the Walker River Basin. As such information
 12 is modified or changed in any way, the District, the State of Nevada, the State of California, the
 13 United States Board of Water Commissioners, and Mineral County shall **notify the United**
 14 **States and the Tribe of such modifications and changes** within two weeks of its receipt **and**
 15 **shall make this information readily available to the United States and the Tribe in**
 16 **compliance with this paragraph. The requirements of this paragraph** shall continue until
 17 the Court determines that service by the United States and the Tribe is complete. Those parties
 18 are directed to cooperate fully with the efforts of the United States and the Tribe to complete
 19 service and to advise their members and constituents of the need to cooperate fully with those
 20 efforts.

23 11. The United States and the Tribe may seek costs of service, pursuant to the
 24 requirements of FED. R. CIV. P. 4(d), at any time during their service efforts under this Case
 25 Management Order.

26 12. After the United States **and the Tribe have** received the information from the
 27 other parties described in ¶ 5 and compiled the list of the parties whom **they intend** to serve, that
 28

list and a description of the procedures by which it was compiled shall be provided to the other parties who shall have 45 days to inform the Magistrate Judge whether, in their view, the list is complete and includes all of the water right claimants within the categories described in ¶ 2 who can reasonably be identified. Any disagreements among the parties over the adequacy of the list prepared by the United States and the Tribe shall be resolved by the Magistrate Judge. **Corrections to the list of intended parties may be made during the service efforts of the United States and the Tribe.**

13. Following the completion of service, the parties, by agreement or with the assistance of the Magistrate Judge, shall develop procedures for the efficient management of the litigation, given the number of parties to the case. Such procedures may include the use of common counsel, special procedures for the service of pleadings or any other mechanism which the parties deem likely to reduce the burdens on the Court and the parties in a case of this magnitude.

D. PHASING OF PROCEEDINGS

14. Pretrial proceedings in this case shall be conducted in multiple phases as follows:

- a. Phase I proceedings shall relate to the threshold issues defined in Section B of this Case Management Order.
- b. Additional phases of the proceedings shall encompass all remaining issues in the case, including but not limited to:
 - (1). All other claims, cross-claims, counterclaims, defenses and issues raised by the pleadings of the parties that are not included within the threshold issues identified in Section B of this Case Management Order.
 - (2). All other issues related to the Tribal Claims.
 - (3). All issues related to the Federal Claims.

1 15. All defendants and intervenors in these proceedings shall file answers to the
2 United States' and Tribe's first amended counterclaims within **45 days after completion of**
3 service, or where service is by publication, within 60 days of the last day of publication of such
4 service. However, the time for filing cross-claims among the non-federal parties is tolled until
5 further order of the Court. No default shall be taken for failure to appear.
6

7 16. Upon the completion of Phase I of the case, it may be necessary to join additional
8 parties.

9 **E. DISCOVERY AND FURTHER PROCEEDINGS**

10 17. Although it is premature to implement schedules and orders concerning
11 discovery, the parties shall begin to develop discovery plans consistent with this section.
12

13 18. Discovery shall be allowed to all parties upon the threshold issues defined in
14 Section B of this Case Management Order. The United States, the Tribe, the States of Nevada
15 and California and the District shall file a report with the Court, within 60 days after the entry of
16 this Case Management Order, regarding the development of a second case management order
17 addressing the extent of the parties' agreement upon the terms and conditions of discovery
18 regarding Phase I issues. **This second case management order shall, among other things,**
19 **address the timing of the commencement of discovery on Phase I issues.**
20

21 19. All motions dispositive or partially dispositive of any threshold issue shall be
22 deferred until after completion of **Phase I** discovery and shall be filed within three months after
23 completion of **this** discovery.

24 a. A party opposing such motions shall respond within 40 days of service
25 thereof, and the moving party may file a reply within 20 days of service of such response.
26
27
28

1 b. To the extent the threshold issues are not resolved on the pleadings or
2 documentary presentation associated with such motions, an evidentiary hearing shall be held on
3 the unresolved issues.

4 20. **If any party wishes to perpetuate testimony relevant to this matter, that**
5 **party shall comply with FED. R. CIV. P. 27 and any other applicable rule of this Court. In**
6 **conjunction with the first such effort in this matter, the parties shall confer to determine**
7 **additional procedures, if any, for this and other such efforts in this case. The parties shall**
8 **present the Court with their written agreement on any such additional procedures. If they**
9 **cannot agree on procedures, the parties make a written application to the Court for**
10 **assistance in resolving such procedures.**

11 21. Any party may move for modification of this Case Management Order for good
12 cause shown.

13 IT IS SO ORDERED.

14 Dated _____, 2000.

15
16
17
18
19 _____
20 The Honorable Edward R. Reed
21 United States District Court Judge
22
23
24
25
26
27
28

WALKER RIVER HYDROGRAPHIC REGION

